A. Southwestern Bell Provides Full Public Disclosure of the Terms and Conditions of All Transactions Between SWBT and SBCS

AT&T contends that SBCS's Internet disclosures fail to provide information sufficient to meet the requirements of section 272(b)(5) and the Commission's implementing regulations. See AT&T Comments at 85. AT&T offers, as an example, a SWBT/SBCS services agreement called "Official Communications." Id. Yet, this very example demonstrates how complete SBCS's disclosure actually is. The text of the services agreement, as posted on the Internet, provides detailed information about the scope of services offered, the type of personnel assigned to the project (using categories such as "communications consultant" and "service representative"), the frequency with which the services are provided (available separately in a supplemental schedule), the time frame for the service (shown by the terms of the agreement and the execution dates), the hourly rates for each category of personnel, the cost methodology for each rate (whether or not it is fully distributed costs), as well as the contact information for the coordinators of these services.[34]

The "Official Communications" agreement fully comports with the Commission's recommendation that such agreements disclose the number and type of personnel assigned to a project, the level of expertise of such personnel, any special equipment used to provide the service, and the length of time required to complete a project. See Second Louisiana Order, 13 FCC Rcd at 20793, ¶ 337. Moreover, the level of disclosure available through posting of this agreement is equivalent to, or fuller than, the disclosure approved in the New York Order. See

[34] For the text of the Communications Agreement, *see* <www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/affdocs/sched017_pa.doc>. The frequency with which services are provided is disclosed at <www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/affdocs/supinfo_freqoccur.doc>.

New York Order ¶ 413. For example, one such agreement in New York – the New York Telephone Company/BACS Technical Services Agreement – discloses no more than categories of employees (such as clerical, TIPS consultant, etc.), a range of personnel expected to work on each project, the pricing criterion, the rate per day of each category of personnel, and the frequency of transaction per service.[35] Like SWBT's Official Services Agreement, Bell Atlantic's disclosures do not provide the minute detail AT&T proposes, such as the length of time required by each employee to render a particular service. See AT&T's Kargoll Aff. ¶ 18.

Southwestern Bell's other postings also meet the Commission's disclosure requirements. For example, a typical SBCS/SWBT temporary project agreement, described by AT&T as the "vaguest of all [SWBT's] Internet disclosures," id. ¶ 21, discloses not only the terms and conditions of the agreement as recommended under the Second Louisiana Order, but also the names of each individual employed on the project as well as the number of hours each personnel category worked each month.[36] There are, in addition, two separate schedules of supplemental information on the Internet that provide further information concerning the frequency with which the various services are provided, as well as the personnel involved in providing such services. See Weckel Aff. ¶ 58.[37]

AT&T objects to the fact that Southwestern Bell does not post competitively sensitive billing information from individual transactions between SBCS and affiliated BOCs. AT&T

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[35] See <www.callbell.com/regreqs2/detail.cfm?contractID=74>.

[36] See <www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/affdocs/PA026-01-11-2000.doc>.

[37] To the extent that there may be minor, substantive inconsistencies in SWBT's Internet postings, as alleged by AT&T, these can be rectified through the biennial audit required by section 272(d) and are not "sufficient to show systemic flaws with [SBC's] ability to comply with section 272(b)(5)." New York Order ¶ 412.

Comments at 86. But, in its Accounting Safeguards Order,[38] the Commission explicitly acknowledged the appropriateness of confidentiality protections for sensitive business information: "While section 272(b)(5) requires BOCs to reduce their transactions to writing and make them 'available for public inspection,' we will continue to protect the confidential information of BOCs." 11 FCC Rcd at 17593-94, ¶ 122. In enacting the audit provisions of section 272(d)(3)(C), Congress also recognized the appropriateness of protecting such information from public disclosure. See 47 U.S.C. § 272(d)(3)(C).

Consistent with Congress's intent and the Commission's rules, the Texas PUC approved confidential treatment for the billing information referenced by AT&T. See Weckel Aff. ¶ 54. SWBT agreed during the Texas PUC's collaborative process to make this sensitive information available for inspection in its central file, see Larkin Reply Aff. ¶ 7, and to update it on a semi-annual basis, id. ¶ 8. Subject to a protective order, any interested party, including AT&T, may review the billing records at the headquarters of SBCS, SWBT, Pacific Bell, Nevada Bell, or any other affiliated ILEC. See Weckel Aff. ¶ 54. Thus, the confidential treatment of SWBT's billing information in no way compromises the Commission's goal that unaffiliated parties have access to the information necessary to take advantage of the same rates, terms, and conditions as a Southwestern Bell section 272 affiliate. See Second Louisiana Order, 13 FCC Rcd at 20791-92, ¶ 335.

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[38] Report and Order, Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17539 (1996).

B. AT&T's Arguments Concerning SWBT's Proposed Intrastate Switched Access Tariffs Are Moot

AT&T claims that both parts of SWBT's pricing plan for intrastate switched access service ("OPP1" and "OPP2") discriminate against larger interexchange carriers. AT&T Comments at 87; AT&T's Kargoll Aff. ¶ 38 n.33 & Attachments 1, 2. This plan provided volume-related discounts that were designed to give unaffiliated interexchange carriers an incentive to keep their access traffic on SWBT's network, rather than using one of the many competitive access providers in Texas. The Texas Commission, however, granted AT&T its requested relief by rejecting both parts of SWBT's pricing plan, so those issues are now moot. See App. B, Tabs 3 (order affirming rejection of OPP2), 4 (transcript affirming rejection of OPP1). This episode thus serves principally to confirm that CLECs have a hospitable forum for raising grievances regarding nondiscrimination requirements in Texas, and that this Commission's oversight of Southwestern Bell will be matched or exceeded by rigorous state investigation.

V. APPROVAL OF THE APPLICATION WOULD BE CONSISTENT WITH THE PUBLIC INTEREST

In its opening brief, Southwestern Bell demonstrated that allowing Southwestern Bell to enter the interLATA market would substantially increase competition for both interLATA and local services and is thereby "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C). As market experience in Connecticut and other states proves, local and long distance competition in Texas will increase after approval of this Application, leading to lower prices and increased economic growth. There will, moreover, be no consequential risk of discrimination, cross-subsidy, or any harmful pricing practices after interLATA relief. Southwestern Bell Br. at 47-62.

The competitors' response to this showing is two-fold. First, they argue that SBC has behaved badly in the past and therefore does not deserve 271 relief. Second, they argue that SBC will behave badly in the future because the safeguards established by the Texas PUC to prevent "backsliding" are inadequate. Neither set of arguments has merit.

A. SWBT Has Not Engaged in Misconduct

The opponents of relief respond to SWBT's public interest showing with attempted character assassination and a hodge-podge of unfounded complaints and allegations that, in the end, show nothing more than that competitors have routine disagreements with one aspect of Southwestern Bell's operations or another.

1. Several commenters challenge Southwestern Bell's commitment to open local markets to competition, based on Southwestern Bell's judicial and legislative activities. See, e.g., Allegiance Comments at 12-18 (citing "litigious behavior"); DSL.Net Comments at 9 (contending that "SWBT has backed legislation to remove regulatory power of the Texas PUC"). These commenters suggest that Southwestern Bell should forgo its constitutional and statutory rights to seek judicial relief and to advocate its positions in the Texas legislature as the price of section 271 relief.

These arguments are misguided as a matter of principle, and wrong as a matter of fact. Southwestern Bell has resorted to litigation where it thought that basic constitutional or statutory rights were in question. Often the courts have agreed with Southwestern Bell, but even where they have not, the process is valuable to determine the exact parameters of rights and obligations established by Congress and this Commission. AT&T has, in fact, been far more litigious than Southwestern Bell, pursuing more than 30 appeals from state arbitration awards, including the Mega-Arbitration decision of the Texas PUC. Southwestern Bell, by contrast, voluntarily agreed

to withdraw its pending appeals in Texas in order to provide certainty to competitors and to speed the 271 approval process. Texas 271 Agreement § 18.2; see Shelley Aff. ¶ 48.

Southwestern Bell's legislative activities – in addition to being constitutionally protected and beyond the purview of this Commission – likewise have in no way been aimed at undermining competition. Contrary to the claims of Allegiance and DSL.Net, Senate Bill 560 does not limit the Texas PUC's ability to regulate SWBT's wholesale offerings. Thus, there is no basis whatsoever for the contention that the bill would prevent the PUC from enforcing xDSL provisioning standards. Nor would Bill 560 prohibit the PUC from regulating the relationship between SWBT and its affiliates. The bill merely prevents the PUC from adopting rules for affiliate transactions and joint marketing that are more burdensome than federal requirements. Thus, the PUC is free to enforce the requirements of the 1996 Act and FCC regulations.[39]

2. Other commenters seek to show that SWBT should not be allowed to enter the local market based on dated statements made by Texas PUC commissioners and a federal court. AT&T Comments at 88-92; Sprint Comments at 83-84. Specifically, AT&T refers to comments made by PUC Commissioners Walsh and Curran at a May 21, 1998 Open Meeting. Sprint rehashes statements made by the PUC and a federal district court in June and August of 1998, respectively. Sprint Comments at 83-84. The very fact that SWBT's opponents are forced to rely on these outdated statements is a testament to SWBT's current compliance with state and federal law. In that regard, the Texas PUC's unanimous finding that "SWBT has earned the right to enter the long distance business in Texas" speaks for itself. Texas PUC Evaluation at 1.

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[39] As long as the federal market opening requirements remain in place – and Texas has no authority to abrogate those requirements – ALTS is simply wrong in claiming that SWBT could, under Senate Bill 560, somehow avoid the unbundling and resale obligations of the 1996 Act.

3. Commenters also cite alleged bad acts committed by SWBT or SBC. Sprint, for example, makes much of a consent decree reached between SBC and the Commission concerning potential 271 and 272 compliance issues raised by SBC's merger with SNET. See Sprint Comments at 83. This decree, of course, says nothing about SWBT's conduct in Texas. Equally important, the decree in no way shows any bad intent on the part of SBC. The decree makes clear that it "does not constitute an adjudication of the merits, or any finding on the facts or law regarding any violations committed by SBC arising out of SBC's acquisition of SNET." Consent Decree, SBC Communications Inc., FCC 99-153, ¶ 15 (rel. June 28, 1999). Moreover, the Commission noted "(1) SBC's history of compliance; (2) SBC's adoption of a comprehensive compliance plan designed to ensure future compliance with section 271 and section 272; (3) SBC's cooperation in investigating and disclosing the facts and circumstances surrounding this matter; (4) SBC's cooperation in providing access to its employees and to documents subject to SBC's claim of privilege; (5) submission of declarations of SBC senior corporate officers indicating that, during the relevant time periods, they had no knowledge of any specific statements, representations or conduct of SBC employees, with respect to the Commission staff, that formed the subject of the Commission's investigation in this matter; and (6) SBC's creation of a training program for all employees dealing with the FCC." Id. ¶ 17.

ALTS argues that SWBT delayed DSL providers' entry by failing to produce documents during a Texas PUC arbitration. ALTS Comments at 55. SWBT has produced the documents and the Texas PUC assessed the other parties' attorneys' fees as a sanction, the amount of which SWBT negotiated with both Covad and Rhythms. See Order on Appeal of Order No. 20, Petition of Accelerated Connections Inc., Docket Nos. 20226, 20272 (Tex. PUC Oct. 13, 1999).

The Commission has noted that such "isolated instances" should not affect section 271 relief. New York Order ¶ 444.

Allegiance contends that SWBT improperly influenced Ernst & Young's decision to withdraw from work related to AT&T's OSS interfaces. See Allegiance Comments at 15. Once again, the allegation is baseless. AT&T's lawsuit over this incident was recently dismissed by the Texas Court of Appeals. See AT&T Corp. v. Southwestern Bell Tel. Co., No. 05-99-00186-CV, 2000 WL 14711, at *4 (Tex. Ct. App. Jan. 11, 2000) ("The fact that Ernst & Young had agreed to work for Southwestern Bell's business rival and legal adversary would naturally give rise to a concern as to how Ernst & Young intended to handle the apparent conflict."). Moreover, in a deposition, an Ernst & Young witness made it clear that SWBT did not pressure Ernst & Young to withdraw from its engagement with AT&T. Deposition Transcript of Philip A. Laskawy at 16 (App. B, Tab 5). In any case, Ernst & Young's withdrawal did not slow AT&T's entry into the local market, and Allegiance has not provided evidence suggesting that it has.

4. Commenters also use this proceeding to address issues that fall far outside SWBT's 271 application. For example, several carriers claim that they should be afforded a "fresh look" opportunity as a condition of SWBT's interLATA relief. See Adelphia Business Systems Comments at 2; ALTS Comments at 62-65; KMC Comments at 3; e.spire Comments at 10; Allegiance Comments at 12-18. In other words, these carriers seek to terminate existing contracts and negotiate new ones. The Commission flatly rejected the identical argument in the New York proceeding, concluding that such arguments had no place in that section 271 proceeding. New York Order ¶ 391. The same is true here.

BlueStar Communications asserts that the Commission should "take steps" to assure that SBC will extend the commitments it has made in Texas to the other states in SBC's region. BlueStar Comments at 7. The section 271 process, however, proceeds on a state-by-state basis. See 47 U.S.C. § 271(b). It is beyond the bounds of this proceeding to address the terms for interLATA relief in other states. If anything, BlueStar's challenge strongly supports Southwestern Bell's Texas 271 Application, by holding out as a model the resolution reached in Texas.

BlueStar also claims that the Commission should require SBC to demonstrate that it is in full compliance with the SBC/Ameritech merger conditions prior to granting interLATA relief. BlueStar Comments at 7. The merger conditions have their own, very detailed, audit and enforcement provisions. SBC/Ameritech Merger Order, 14 FCC Rcd at 15033-36, App. C, ¶¶ 65-67. SBC has not been found to have violated any of these provisions, and the conditions themselves provide more than sufficient remedies (potentially totaling billions of dollars) if there is a violation in the future. Id. at 15037-38, App. C, ¶¶ 68-73.

5. Other commenters allege that granting Southwestern Bell section 271 relief will enable SWBT to engage in anticompetitive conduct. AT&T, for example, claims that Southwestern Bell will engage in price squeezes if it is allowed to provide in-region interLATA services. AT&T Comments at 93-95. Southwestern Bell's opening brief and supporting affidavits rebutted this theory, and cited Commission precedent to the same effect. See Southwestern Bell Br. at 57-58; Kahn & Tardiff Aff. ¶¶ 52-55; see also, e.g., First Report and Order, Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, 16101, ¶ 278 (1997) ("[W]e have in place adequate safeguards against such conduct."). Furthermore, the same arguments were made by commenters in opposition to Bell Atlantic's application in New York

without success. See, e.g., AT&T Comments at 67-76, New York Application, CC Docket No. 99-295 (FCC filed Oct. 19, 1999).

AT&T also argues that conditioning the 3-year extension of the Texas 271 Agreement upon approval of this Application is a "poison pill" that prevents CLECs from committing to market entry under the terms of the Texas 271 Agreement until Southwestern Bell is allowed into long distance. AT&T Comments at 92-93. This claim highlights that, in the Texas 271 Agreement, SWBT agreed to go beyond what is required of it under sections 251 and 252. See Southwestern Bell Br. at 5-6, 23, 35-36; Shelley Aff. ¶¶ 39-42. If the Commission grants this Application, CLECs will continue to receive the benefits of that bargain for several more years. On the other hand, if the Application were to be denied, CLECs would still be guaranteed access to local facilities and services on the terms the 1996 Act and applicable FCC and Texas PUC rules require. AT&T's claim that the possible expiration of the Texas 271 Agreement would harm CLECs thus provides an affirmative reason to grant the Application, not to deny it.

Sprint claims that SBC should be held to a higher standard than Bell Atlantic because of its comparatively larger size after the Ameritech merger. See Sprint Comments at 66-73. Specifically, Sprint asserts that SBC's larger size increases opportunities for "exclusionary conduct" and that the Commission should take that into account in considering Southwestern Bell's Application. See id. at 68. The merger conditions imposed on SBC, however, prevent anticompetitive conduct. In fact, the Commission concluded that it "expects that with these conditions, competition in the provision of local exchange service, including advanced services, will increase both inside and outside the merged firm's region." SBC/Ameritech Merger Order, 14 FCC Rcd at 14717, ¶ 4 (emphasis added).

B. The Performance Remedy Plan Approved by the Texas Commission Will Prevent Any "Backsliding" by SWBT

The Texas Commission has approved a detailed Performance Remedy Plan designed to ensure that SWBT has significant financial incentives to avoid anticompetitive behavior after section 271 relief is granted in Texas. Opponents attack this plan on two grounds. First, they claim that the performance data provided by SWBT (which will form the basis for any fines and penalties) is unreliable. Second, they claim that the fines and penalties established under the Plan are insufficient to prevent backsliding. Neither claim has merit.

1. AT&T and MCI WorldCom argue that SWBT's "self-reported performance data" cannot be trusted. AT&T's Pfau & DeYoung Aff. ¶ 15; MCI WorldCom Comments at 33-34. But they provide no basis for that assertion.[40] Telcordia has thoroughly evaluated SWBT's data collection methods and procedures, and found them sufficient. Dysart Aff. ¶¶ 65-76; Dysart Reply Aff. ¶¶ 65-69. Indeed, Telcordia has found a 99.94 percent accuracy rate in SWBT's data. Dysart Aff. ¶ 70. Telcordia confirmed that SWBT properly implemented the Texas PUC's business rules for each performance measure; validated the numerical results reported by SWBT for March through June 1999; verified that SWBT is reporting its results in accordance with the Texas PUC's requirements; and recommended improvements to SWBT's processes and procedures, which have been implemented insofar as they supported Telcordia's findings. See Texas PUC Evaluation at 109; Telcordia Final Report § 6 (Ham Aff. Attach. A); Tex. PUC Dec. 16, 1999 Open Meeting Tr. at 43-47; Dysart Aff. ¶¶ 65-76.

[40] The Department of Justice found fault with the specific SWBT data concerned with provisioning xDSL-capable loops. We responded to those concerns in Part II. A.1, supra.

As desired by this Commission, SWBT's performance data is also subject to regular scrutiny by the Texas PUC. New York Order ¶ 442. In fact, prior to approving SWBT's application, the Texas PUC carefully reviewed SWBT's data through November 1999. Moreover, each CLEC operating in Texas, including AT&T and MCI WorldCom, has an opportunity to check SWBT's data insofar as they are involved in the relevant transactions with SWBT. Dysart Reply Aff. ¶¶ 77-79. During November and December 1999, SWBT and CLECs carried out data reconciliations for two hot-cut measures and a UNE installation timeliness measure under Texas PUC supervision. The reconciliations resulted in only minor changes that did not affect SWBT's achievement for all three measures. See Dysart Aff. ¶¶ 346, 657-658; Conway Aff. ¶¶ 59-60, 96-97; see generally Dec. 14, 1999 Dysart Texas PUC Affs. (Dysart Aff. Attachs. T & W). That is a further check on the accuracy of SWBT's data.

AT&T complains about a problem SWBT experienced with its data collection processes in Missouri over a year ago. AT&T's Pfau & DeYoung Aff. ¶¶ 22-24. Notwithstanding the irrelevance of events in Missouri to events in Texas, AT&T's complaint is unwarranted: SWBT corrected this problem long ago, and it predates the performance data on which SWBT relies in its Application (August through October 1999) by several months. Dysart Reply Aff. ¶ 76.

AT&T also criticizes a revision SWBT made to its Texas maintenance data in early 1999, AT&T's Pfau & DeYoung Aff. ¶ 25, and complains about SWBT's manual processes for collecting and coding certain performance data, id. ¶¶ 56-58. AT&T is unable, however, to provide any suggestions for alternative manual or mechanized processes to avoid such errors in the future. It is true that any manual involvement in the data collection process carries with it some risk of human error; however, the record shows that SWBT has promptly resolved all issues arising from its manual performance data collection processes, often in extensive

cooperation with CLECs (including AT&T) in data reconciliations. Dysart Reply Aff. ¶¶ 65-69, 79. SWBT should not be condemned for correcting its performance data; it should be applauded for taking decisive action to ensure the accuracy and completeness of all the data it reports.

MCI WorldCom argues that order volumes are too small for SWBT's performance measures to be reliable. MCI WorldCom Comments at 33; MCI's McMillon & Sivori Decl. ¶¶ 237-238. But low volumes actually cause even a low number of misses to affect the z-scores disproportionately. Dysart Reply Aff. ¶ 101. Accordingly, compliance at current level of demand is a strong indicator that SWBT's performance will remain positive as demand increases. Given the already extensive testing of SWBT's systems in carrier-to-carrier with actual commercial usage, there is certainly no reason to believe that SWBT's performance will deteriorate as demand increases. Indeed, any such decline in performance – regardless of volume – is precisely what the Performance Remedy Plan is designed to preclude.

MCI WorldCom also complains about the lack of performance measures for SWBT's CMP and Local Operations Center ("LOC") hold times. MCI WorldCom Comments at 34. As discussed at length in SWBT's Application, the performance measures for which SWBT is reporting data were developed in a collaborative process at which the CLECs had ample and frequent opportunity to indicate what measures were and were not important to them. Dysart Reply Aff. ¶¶ 2-3, 79. The resulting battery of measures more than doubles the number of categories deemed sufficient by DOJ. Id. In the case of the CMP, CLECs have an effective alternative in the "go/no go" voting process, which affords them the ability to vote on whether a release should go forward. See Ham Aff. ¶ 17. Further, SWBT's measures are reviewed every six months under the supervision of the Texas PUC; therefore, this list of measures is not static.

It will evolve and grow as necessary, according to the CLECs' requirements. Dysart Reply Aff. ¶ 79.

2. A number of commenters claim that, even if SWBT's compliance data is accurate, SWBT's Performance Remedy Plan ("Plan") provides inadequate incentives to avoid discrimination. These assertions are baseless, as we explain below. They also ignore all the other safeguards and incentives described in our opening brief that will prevent any "backsliding" by SWBT once 271 relief is granted in Texas. Southwestern Bell Br. at 45-47.

The Texas Commission was "keenly aware of the need to fashion a remedy plan that produced sufficient incentives for SWBT to maintain a high level of wholesale service, and sufficient disincentive for SWBT to engage in anticompetitive behavior after 271 relief is granted." Texas PUC Evaluation at 106. The PUC developed a carefully crafted plan, which, it found, "adequately addressed all of the CLECs' concerns." Id.

The Plan contains all of the characteristics that the Commission has previously identified as important: It requires SWBT to make significant payments to CLECs and the Texas Treasury in the event that SWBT fails to meet certain measures; the measures are clearly defined and cover a comprehensive range of carrier-to-carrier performance; the Plan will quickly detect and punish poor performance; the Plan is self-executing; and the data are accurate. New York Order ¶ 433.

MCI WorldCom offers Southwestern Bell's relatively low payment of liquidated damages for November 1999 as evidence that the Plan is ineffective. MCI WorldCom Comments at 68-69. However, this proves only that (1) carriers were still in the process of opting into the plan in November, as the Texas 271 Agreement had just recently been finalized, (2) SWBT has substantially succeeded in meeting the performance measurements, and (3) in the

rare instances in which it has failed to meet the measurements, the failures were not carried over from previous months, which would have triggered higher damage payments. Additionally, it should be noted that payment requirements for a number of measures have been increased (often trebled) since last November, to address the FCC staff's concerns about nascent services and Texas Commissioners' concerns about certain critical measures. See Dysart Aff. ¶¶ 48-58.

MCI WorldCom and AT&T also assert that per-measure caps weaken the plan. MCI Comments at 79-80; AT&T Comments at 96. The per-measure caps, however, were found by the Texas PUC to be high enough to deter anticompetitive behavior. For example, if SWBT is non-compliant with a Tier 1-High measure,[41] the initial damages cap for the measurement is $25,000. The cap increases in the event that non-compliance persists for more than one month. See Texas PUC Evaluation at 107; Dysart Aff. Attach. H. Damages, therefore, can amount to tens of thousands of dollars per submeasurement. As of October 1999, there were 131 measures and 1,874 submeasures, which allows for significant damages in the event of noncompliance.

MCI WorldCom further claims that the Plan does not take into account the duration of poor performance. MCI WorldCom Comments at 69-70. This is simply wrong. Per-occurrence damages increase as poor performance persists.[42] Texas PUC Evaluation at 107. Given that the damages payment is seven times higher in the sixth month than in the first month, MCI

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[41] Tier 1 measurements apply to customer-affecting functions, such as mean time to restore, while Tier 2 assessments relate to competition-affecting functions, such as OSS availability. Dysart Aff. ¶ 46. In the event that SWBT's performance fails to meet a Tier 1 measure, SWBT must pay damages to the appropriate CLEC; if a Tier 2 measure is not met, SWBT must pay an assessment to the State of Texas. Measures are further broken down into three subgroups – high, medium, and low – depending on how important the measure is to the health of competition.

[42] MCI WorldCom acknowledges as much when it notes that the damages payment is $75 per occurrence for a violation of medium importance for the first month and $600 per occurrence for a violation in the sixth month. MCI WorldCom Comments at 80.

WorldCom's statement that remedies "increase insignificantly for repeated violations" tests the bounds of credibility. MCI WorldCom Comments at 69.

MCI WorldCom's criticism of the fact that Tier 2 payments do not increase for continuing violations is also flawed. Tier 2 payments are already set at a very high level (up to $500 for an individual occurrence of deficient performance); increasing payment amounts, therefore, are not necessary. Moreover, 41 out of a total of 47 reported Tier 2 measures are also Tier 1 measures. To the extent that SWBT is also paying Tier 1 damages, payments will increase if poor performance persists.

It is not the case that Tier 2 payments are required only when SWBT fails to meet a Tier 2 measurement for three consecutive months. See AT&T Comments at 81-96; MCI WorldCom Comments at 65. SWBT must also pay Tier 2 damages in the event that it fails to provide parity performance for key measurements relating to nascent services for six or more months in a calendar year. See Dysart Aff. Attach. H § 14.3. Moreover, because many Tier 2 measurements are also Tier 1 measurements, SWBT must very often pay damages even when its failure to meet a Tier 2 measurement persists for less than three consecutive months and fewer than six months of the year.

MCI WorldCom also criticizes the Plan for not increasing payments based on the severity of the service problem in each individual instance (for instance, the length of a service outage). MCI WorldCom Comments at 80-81. MCI WorldCom made this exact argument in opposition to Bell Atlantic's New York application and the Commission rejected it. MCI WorldCom Comments at 43, New York Application, CC Docket No. 99-295 (FCC filed Oct. 19, 1999). The Commission stated that the criticism does not "undermine our overall confidence that the plan

will detect and sanction poor performance when it occurs." New York Order ¶ 440. MCI WorldCom offers no basis for a different conclusion here.

MCI WorldCom's contention that the Plan contains statistical "loopholes" is baseless. MCI WorldCom Comments at 81. The Commission approved a 95 percent confidence level in the New York Order, and it is an equally "fair compromise" in Texas. New York Order App. B, ¶ 17; see Dysart Reply Aff., Declaration of James E. Kistner ¶ 15; Texas PUC Evaluation at 106-10. MCI WorldCom's related argument that the "K-value" methodology is improper is also incorrect. The K-value preserves fairness by capturing the number of "misses" that can be expected even when parity exists between CLEC and SWBT data. Kistner Decl. ¶ 16; Dysart Reply Aff. ¶ 16; Texas PUC Evaluation at 107. In any event, to address CLEC concerns, SWBT agreed not to apply the K-value methodology to sample sizes of 10 or less, or in the event that SWBT misses a measure on a consistent basis. Kistner Decl. ¶ 16.

AT&T asserts that the damages payments are not sufficiently automatic because the Plan includes narrow provisions allowing SWBT to commence a show cause proceeding to determine whether imposing payments would be unjust. AT&T Comments at 96; see Dysart Aff. ¶ 53. SWBT, however, can only commence a show cause proceeding if its Tier 1 payments to an individual CLEC exceed $3 million in one month, or if they exceed $10 million for all CLECs in a given month. Texas PUC Evaluation at 108. Moreover, while SWBT can attempt to reduce its payments in very limited circumstances, CLECs can also attempt to increase SWBT's payments in certain circumstances. Specifically, in the event that SWBT's performance is non-compliant to a CLEC for three consecutive months on at least 20 percent of the measures reported, and payments made by SWBT to that CLEC amount to less than $1 million, the CLEC has the opportunity to demonstrate to the Texas PUC why additional payments are appropriate. See id.

In short, the Texas Performance Remedy Plan is carefully designed and fully adequate to prevent any backsliding by SWBT once 271 relief is granted. For that reason, ALTS's suggestion that a federal anti-backsliding mechanism should be in place prior to Commission approval of SWBT's Application is superfluous. ALTS Comments at 19. The Commission did not consider a federal mechanism necessary in its order approving Bell Atlantic's application in New York. Neither is a redundant federal mechanism necessary here. As explained in Southwestern Bell's Application, there is ample protection where Southwestern Bell's payments for deficient performance could be as much as $289 million per year; payments under a parallel federal plan could exceed $1 billion over three years; the Commission is empowered to rescind or limit interLATA authority or otherwise impose penalties for violations of legal duties; and Southwestern Bell's performance in Texas will be subject to repeated review when SBC seeks section 271 relief in the remaining 11 in-region states that require it. Southwestern Bell Br. at 47-45.

CONCLUSION

The Application should be granted.

Respectfully submitted,

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